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WHS Act Review
SafeWork SA
Policy and Governance Team
GPO Box 465
ADELAIDE SA 5001
By e-mail - webmaster.safework@sa.gov.au

Re: Review of the Work Health and Safety Act 2012 (SA)

Thank you for the opportunity to contribute to the review of the *Work Health and Safety Act 2012* (SA).

Does the proposed review comply with the legal requirements?

At the outset, we wish to lodge a strong protest about the purported restriction of the review of the Act to those sections that differ from the model Act. Section 277(3) requires that there be a '…second review of the operation of this Act...'. There is no power for SafeWork SA to pick and choose which sections of the Act will be reviewed. The prospect of a national level review in 2018 does nothing to affect the operation of s.277(3) and does not minimise the intention of the Parliament for a full and proper review to be carried out.

To us, this seems very pointed. The differing sections listed in the paper were the subject of long and at times heated debate in and outside Parliament. SafeWork SA at the time openly resisted these amendments, citing an unrealistic dedication to the concept of 'harmonisation' as an overriding principle at the expense of laws that conformed to the established principles of the Westminster model of criminal law. On this basis alone, the conduct of this review by SafeWork SA is questionable from an objectivity standpoint. As we all know, harmonisation was not achieved and ought not now be the primary goal. The review requires the Act in its entirety to be reviewed and we consider that all of the sections of the Act as a whole must be considered for it to be properly reviewed.

If this proposed review proceeds on this limited basis, we believe that it will be *ultra vires* and any actions taken as a result of any conclusions that it reaches will be challengeable at law. We urge you to consider that before commencing the process.

We also note with concern the very short time allowed for feedback. While we acknowledge that the review is late getting under way, this should be of less concern than ensuring that interested parties have sufficient time to give considered input to such an important review.

General commentary

It is clear that overall, it is still too early to make any judgements about the operation of the Act generally. Our members have made no substantial comments on it. The first Category 1 charges laid under the Act are still a long way from commencement of trial proceedings. The few other matters considered under the offence and penalty provisions (ranging from notices to enforceable undertakings) do not appear to have generated any issues warranting review.

Indeed, as you have noted in your paper, most of the issues raised in the first review turned on the operations of SafeWork SA itself rather than the Act. It seems to us that this remains the case.

From this we conclude that so far, there is nothing by way of unintended consequences to suggest that the Act needs any sort of modification.

The points of difference between the SA WHS Act and the model legislation

In order to conform to the request for feedback, and without conceding the legality of the scope of this review, we submit that our earlier comment applies specifically to the differing sections, bar one (see below) – that so far, there is nothing by way of unintended consequences to suggest that they need any sort of modification.

However, in light of the scope of this review, we have attached our more detailed views on the differing sections to reinforce our position that they should not be disturbed with the exception of the entry permit arrangements set out in item 5 of the attachment.

We can be available to enlarge on these views as needed.

Yours sincerely,

Robin Shaw
Manager

Attachment 1

Model WHS Act/Regulations		WHS Act (SA)	Comments
1	Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (section 17(1), model WHS Act).	Provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only to the extent to which they have the capacity to influence and control the matter (section 17(2), WHS Act).	WHS Law is criminal law. It imposes a criminal burden upon a duty holder to ensure that it takes steps to eliminate or minimise risk. It defies logic to suggest that a person can be held liable for something they cannot control and influence. Without this test duty holders will have a legal obligation to act in circumstances where they have no control and influence. A *prima facie* breach of the law will occur and a duty holder will then be left to defend itself by arguing that it was not reasonably practicable to have taken the steps it is alleged it should have taken. The law as it currently stands is sound, consistent with criminal law principles and requires no amendment.

Model WHS Act/Regulations		WHS Act (SA)	Comments
2	Provides for prosecution exceptions for: - volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace; and (section 34(1), model WHS Act). - unincorporated associations (although unincorporated associations may be PCBUs for the purposes of the model WHS Act, their failure to comply with a duty or obligation under the WHS Act does not constitute an offence and cannot attract a civil penalty)(section 34(2), model WHS Act).	The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act (section 34, WHS Act).	This is nothing more than a clarification that does not detract from or modify the operation of the model section. To the best of our knowledge there have been no issues of this nature to date. In principle, anything that clarifies legislation is of value and should be retained.
3	Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought (section 68 (2)(g), model WHS Act).	As per the model WHS laws a HSR can seek assistance from any 'person'. However, the WHS Act (SA) provides that 'any person' is limited to: - a person who works at the workplace; - a person who is involved in the management of the relevant business or undertaking; or - a consultant who has been approved as required by the legislation (section 68(3) and (6)), WHS Act).	The current drafting is sound because it ensures that the person from whom the HSR is seeking assistance from has a connection with the workplace being entered.

Model WHS Act/Regulations		WHS Act (SA)	Comments
4	Provides that an HSR is entitled to five training days in the first year, one in the second and one in third (regulation 21, model WHS Regulations).	The WHS Act (SA) provides for an increase in the number of training days for HSRs to five in the first year, three in the second and two in the third (section 72(9), WHS Act).	While we believe that the increase from the model was not warranted, we have had no issues with it and see no reason to disturb it.
5	Allows for a WHS entry permit holder (EPH) to enter a workplace to inquire into a suspected WHS contravention, where the contravention is in relation to a 'relevant worker'. The EPH must reasonably suspect a contravention is occurring or has occurred when entering for this purpose. (section 117, model WHS Act). Prior to recent changes, the model WHS laws provided that an EPH was not required to give notice before entering a workplace. However, amendments to the model WHS Act now require an EPH to provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the person with management or control of the workplace before entry takes place.(section 68 (3B), model WHS Act).	The WHS Act (SA) includes certain policies and procedures relevant to when a EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act (section 117, WHS Act). This includes providing that EPHs must give consideration as to whether it is reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend at the workplace at the time of entry (section 117(3)). However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred (section 117(6)), WHS Act).	This is one case where we believe that the SA provisions should be amended. The current wording of s.117(3) was a very poor compromise reached in Parliament as a result of opposition to the original model 117, which furnished unfettered entry rights where there was a 'suspected contravention'. To the best of our understanding, the SA s.117(3) has been unworkable and only honoured in the breach. We submit that all entries by EPHs be subject to notice provisions. This is something we argued for long and hard when the Bill was debated. The correctness of our view has been demonstrated by the changes to the model. We suggest the drafting of the model Act be adopted.

Model WHS Act/Regulations		WHS Act (SA)	Comments
6	Provides that for the purposes of an inquiry into a suspected contravention, an EPH may enter any workplace for the purpose of inspecting, or making copies of: - employee records that are directly relevant to a suspected contravention; or - other documents that are directly relevant to a suspected contravention and that are not held by the relevant PCBU. Before doing so, the EPH must give notice of the proposed entry to the person from whom the documents are requested and the relevant PCBU. This notice must be given during usual working hours at least 24 hours, but not more than 14 days, before the entry (section 120, model WHS Act).	As per the model WHS laws, an EPH can enter a workplace for the purpose of inspecting or making copies of employee records and other documents directly relevant to a suspected contravention. However, The WHS Act (SA) provides that the right of an EPH to require copies of a document is subject to any direction that may be given by an inspector. This may include a direction that copies of a document not be required to be made and provided to the EPH (section 120(6), WHS Act).	This is a common-sense variation designed to protect the privacy of persons whose records might otherwise be accessed for purposes unrelated to the suspected contravention. An example of this might be the collection of personal details of workers for the purposes of identifying non-union workers. Because those people are at the worksite, their names and details can be argued to be relevant to the suspected contravention. PCBUs must comply with privacy laws. The power should be subject to the direction of an inspector and should be accompanied by an amendment for notice provisions in line with the model Act.
7	The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for use immunity.	The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act). The provision states that a person must answer questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.	This is consistent with the principles in criminal law. The fact that this is workplace safety legislation does not legitimise the violation of one of the fundamentals of the Westminster model of criminal law. The use immunity in the model Act does little or nothing to protect individuals.

Model WHS Act/Regulations		WHS Act (SA)	Comments
8	Provides that the Minister may approve a Code of Practice (COP) for the purposes of the Act and may vary or revoke an approved COP (section 274(1), model WHS Act). However, the Minister may only approve, vary or revoke a COP if it was developed by a process that involves consultation between the Governments of the Commonwealth and each State and Territory, unions, and employer organisations (section 274(2), model WHS Act). An approval of a COP, or a variation or revocation of an approved COP, takes effect when notice of it is published in the Government Gazette, or on date specified in the approval, variation or revocation (section 274(4), model WHS Act).	As per the model WHS laws, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP. However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include: - a requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (section 274(3)), WHS Act); - a requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act (section 274(2), WHS Act); and - a requirement that COPs be subject to disallowance by Parliament (section 274(8), WHS Act).	We regard this as simply common sense based on the now well-established record of the drafting of very long, highly technical, often complex and often inflexible Codes that in many cases were eventually, after significant debate and effort, were simplified and published as guidance. It was clear from this experience that: 1. The drafting of the Codes was carried out with no thought at all for the ability of small businesses to comprehend them, let alone implement them. Thus the need for the OSBC to scrutinise them 2. The drafts generally took no notice of the differences between jurisdictions and to that extent were at least partly unworkable (or when they did, they became massive and lacking utility) – thus the need for the State body the review them. 3. Given that Codes of Practice are admissible as evidence, they almost reach the level of regulations in law. It is therefore important that the Parliament have the final say in the publication of the Codes rather than a regulator that, with respect, does not always get things right. We see these filters on the making of Codes as ensuring that when Codes are published, they are fit for purpose and of real value.